the abtl REPORT

PRESIDENT'S LETTER:

An Awakening

— By Rebecca J. Fortune

In 1988, fires raged throughout Yellowstone National Park. Due to drought conditions and high winds, the flames quickly spread out of control, culminating in the largest recorded wildfire in Yellowstone's history. On the infamous "Black Saturday," high winds propelled the blaze across more than 150,000 acres. On September 8, 1988, the entire park closed for the first time in its history.

Smoldering embers of a blaze sparked in June weren't fully extinguished until the first snowfall of early autumn. With nearly 800,000 acres ruined, many believed the iconic park was irreparably damaged. Yet, today in Yellowstone National Park, 30-year-old Lodgepole pines stand tall and wildflowers bloom where scarred earth once lay dormant. Devastation did not persist. Seedlings took hold and new growth pushed through the ash.

Today, as citizens, professionals, and members of the Association of Business Trial Lawyers, we stand on a bit of charred earth ourselves. By mid-March 2020, the legal world as we knew it came to a screeching halt. Along with nearly every other court in the state, the San Diego Superior Court and U.S. District Court for the Southern District of California closed their doors to the public and conducted all proceedings remotely, or not at all. Jury trials were cancelled; all pending civil proceedings rescheduled to dates uncertain; face to face meetings with clients and opposing counsel ended; and in-person opportunities to network with colleagues were placed on an indefinite hold.

With office closures and staff furloughs arising out of state and local health orders, simple processes once taken for granted – like printing, filing, and serving pleadings and other important correspondence – became an unexpected obstacle to overcome. What was once an all too familiar walk through security, up an escalator or elevator and through a courtroom's swinging door was forbidden. In what seemed like the blink of an eye, what was ... was no more.

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PRESIDENT'S LETTER | *Continued from cover*

Like the individual fires that became an inferno, what began as isolated instances of infection in a faraway place, developed into a worldwide pandemic, leaving hundreds of thousands dead, tens of thousands of businesses shuttered and the once bustling legal landscape laid bare. Previously infrequent telephonic appearances took centerstage, then slowly gave way to video conferencing. Left with no alternative, systems, processes, and courtrooms moved into the 21st Century, ending the need for hours'-long drives for five-minute hearings. Cross-country clients and counsel became no farther away than a time-zone check and ZOOM invitation. Meetings resumed in Brady Bunch fashion, a virtual platform allowing for increased participation and expanded options for dialogue. Seedlings for a new legal reality began taking root.

As the number of infections subside and vaccination rates rise, the question is where do we go from here? Is our goal to reestablish the ways of our past? To build back to exactly what once was? Or do we nurture the seedlings that have taken hold and build processes and purposes anew?

As ABTL San Diego enters a new year, I am both honored and excited for the opportunity to be working with such an esteemed collection of judges and lawyers to build upon the successes of our past, and push towards a brighter and more dynamic future. Joined by the Honorable Lorna Alksne (Vice President), Paul Reynolds (Treasurer) and Andrea Myers (Secretary), I thank our committee chairs and co-chairs in advance for their increased efforts, creativity, and flexibility in imagining new ways to meet our programming goals. And, in this new landscape where virtual platforms make for limitless possibilities, I encourage all our members to engage directly with our officers, committee chairs, and Board of Governors with fresh ideas and suggestions on ways we can work together to breathe new life into this amazing organization.

While we tentatively look forward to kicking off our in-person events with a judicial mixer in late summer or early fall, I am pleased to confirm our chapter will be hosting the annual seminar "Evolution of Business Litigation: Adapting and Overcoming" at the Mauna Lani resort on the Big Island of Hawaii from October 20th to the 24th. Until then, I look forward to working with all of you to push the boundaries of what can be, with the goal of creating a more inclusive, diverse, and dynamic organization utilizing our newly acquired virtual tools.

The fires of 1988 undeniably altered Yellowstone's landscape. But they didn't destroy the park. Instead, the flames cleared a path for new growth ... for an awakening to new opportunities. At the outset of 2021, standing on newly invigorated soil, I invite ABTL's membership to join us in building back but also anew; both stronger and more dynamic than ever. In the coming year, I challenge all of us to look past what once was and foresee all that can be.

Rebecca Fortune is a Partner at Kimball, Tirey & St. John LLP and 2021 President of the Association of Business Trial Lawyers (ABTL).

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ABTL's Leadership Development Committee:

BUILDING THE SD LEGAL COMMUNITY'S TOM BRADYS OF TOMORROW

By Rebecca J. Fortune

> *Leaders are made, they are not born. They are made by hard effort, which is the price all of us must pay to achieve any goal that is worthwhile.*
>
> *~ Vince Lombardi, Green Bay Packers' Head Coach (1959-1967)*

Tom Brady played college football for the University of Michigan and, contrary to conventional wisdom, was not an immediate star. Rather, Brady rode the bench his freshman and sophomore seasons. In his first season as a starter, Brady shared the QB position with teammate Drew Henson. Though Brady closed out his college career with a 20-5 record, his entry into the NFL was met with something less than exuberance—he was drafted by the New England Patriots in the 6th round as the 199th overall pick.

As with his college experience, Brady began his professional career outside the shine of the spotlight, as a third-string backup to Drew Bledsoe, John Friesz, and Michael Bishop. Brady's chance didn't come until the second game of his second season when Bledsoe was taken out after a tough hit from NY Jets linebacker Mo Lewis. Though the Jets held on to win that game, Brady was named the starter for the season's third game, where the Patriots posted a 44-13 win. The rest, as they say, is history.

Between his first collegiate game and his most recent Superbowl championship, Brady learned the skills and temperament needed to make him an effective leader. That skill and experience has allowed him to lead different combinations of teammates to incredible successes—including his most recent championship season with an entirely new organization at the Tampa Bay Buccaneers. And while Brady clearly has raw talent and ability, so do many other professional football players. Brady's leadership skills—and his willingness to put in the time and effort to develop and hone those skills—are key components of his extraordinary success.

The Association of Business Trial Lawyers is led by its elected Board of Governors – a collection of San Diego's most successful judges and partner level attorneys. Our mission is to promote the highest ideals of the legal profession – competence, ethics, professionalism and civility – through a combination of uniquely relevant and engaging educational programs, opportunities for improving trial advocacy, and frequent informal interaction with other members of the bar and bench who embrace and exemplify these ideals. That said, the function of leadership is to produce more leaders, not more followers. In that vein, though our evening events often steal the spotlight, the bulk of our educational programming and judicial "mixing" is dreamt up, organized and delivered by the talented associate attorneys who either sign up or are, as I was, voluntold into being members of our Leadership Development Committee ("LDC").

Under the leadership of co-chairs appointed for two-year terms—currently Marissa Marxen and Bill Keith—the LDC plans and executes approximately three lunchtime "Nuts & Bolts" MCLE seminars and three to four Brown Bag luncheons with members of our federal and state judiciary. In addition, the LDC is responsible for the ABTL's Annual Judicial Mixer, its marque event in which LDC members work hand-in-hand with ABTL's Judicial Advisory Board to facilitate one of the largest "mingling" opportunities for lawyers and judges in the County. Through this process, members of the LDC are afforded the opportunity of direct interaction with numerous sitting judges and top trial attorneys in the San Diego community.

By giving opportunities for hands on, active involvement in the planning and execution of some of ABLT's most important events, the LDC helps make the legal leaders of tomorrow. Just one indication of our success: many of our 2021 committee chairs and BOG members (including your president) got their start on the LDC.

Whether revered or despised, Tom Brady is the winningest quarterback in NFL history, credited with leading his teams to seven Super Bowl titles. But, he wasn't born a leader; his leadership was made with hard work. So, if our BOG member firms haven't already, please encourage the next generation of Tom Bradys … or Mark Mazzarellas … or Claudette Wilsons … or Ronald Styns … or Margaret McKeowns … or Jan Adlers … or Marisa Janine-Pages … to get off the bench and contact Ms. Marxen or Mr. Keith about opportunities in the LDC. They won't regret it, and the continued growth and vitality of the ABTL depends on it.

LDC Upcoming Event Schedule:

March 25 | MCLE Brown Bag - Meet San Diego Superior Court Judge Caietti

May 5 | MCLE Brown Bag - Meet Federal Judges Robinson, Butcher & Goddard

June | MCLE Nuts & Bolts

August/Sept | Judicial Mixer & Charity Event *(in person!)*

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Appeals in the Time of Corona

— By *Rupa G. Singh*

My college English Department Chair used to accuse Gabriel Garcia Marquez's novel "Love in the Time of Cholera" of deception and nuance, wrapped up in an elusive play on words. Overtly, the story follows the reunification of two impassioned but flawed lovers after the woman's fifty-year marriage to a doctor trying to eradicate cholera ends with his fatal fall from a ladder. But because the feminine form of cholera in Spanish, cólera, also means obsessive passion, the book covertly asks the question: how is the disease known as love helped and harmed by extreme passion?

Coronavirus, a novel strain of which causes COVID-19, is also more deceptive and nuanced than just the irredeemable scourge it seems, begging the question: how is the world helped and harmed by the unprecedented Coronavirus outbreak? The harm to all aspects of life seems to be both better-catalogued and more incalculable than the benefit, not the least because the pandemic is not yet behind us. But within the professional world of appellate law that I inhabit, one cannot ignore the fact that this terrible plague may actually lead to improvements in the legal system.

Caseload and Filings

In his 2020 end-of-year report, Chief Justice John Roberts reported that the pandemic has resulted in a nearly twenty percent decrease in the total number of cases filed in the Supreme Court in the just-ended 2019 Term. This included notable declines in forma pauperis appeals, per curiam decisions, and signed opinions. Regional courts of appeals also saw a more modest slowdown in filings, including in the civil, criminal, and bankruptcy arenas. The only federal appeals on the rise were those seeking review of administrative agency decisions, primarily in the immigration, employment, environmental, and energy sectors.

State side, while Chief Justice Tani Cantil-Sakauye has not yet issued her annual State of the Judiciary Address for the year ending 2020, news reports and unofficial data show similar declines in appellate filings across the California Courts of Appeal and the California Supreme Court. Such declines are unsurprising, of course, as the hearings, orders, and trials that would have generated appeals and writs were largely suspended due to trial court closures.

Because the decline in filings comes from court closures, not a reduction in disputes, this necessarily means that fewer matters were adjudicated, fewer questions answered, and fewer lower court conflicts resolved. But the federal and state courts of appeal, led by their respective Supreme Courts, showed remarkable resilience and flexibility in adopting remote operations with only minor delays or postponements. By relieving judges from the burdens of traveling to hearings and arguments resulted in enormous time savings, which when coupled with 24-7 remote access to all materials, contributed to unexpected efficiencies. Attorneys had fewer conflicts with oral argument dates, reducing the need for rescheduling. The time between the noticing of an appeal and a merits adjudication decreased. And case backlogs were reduced. All indications point towards long-term benefits such as making appellate courts more accessible than ever, with attorneys, clients, the press, and the public being able to participate in, attend, or view virtual hearings, live or as archived recordings.

Briefing and Oral Argument

Until the pandemic, merits briefing in the California Supreme Court had to proceed through paper filings and snail mail. After experiencing the ease and efficiency of electronic filings in all District Courts of Appeals, and Petitions for Review in the California Supreme Court, appellate practitioners suddenly needed to worry about securing "wet ink" signatures and giving up precious briefing time to accommodate filing and service of paper merits briefs to the highest court in the state. But the California Supreme Court finally discarded this anachronism in response to the pandemic, allowing electronic filing throughout an appeal's pendency. It also quickly moved to video oral arguments without missing a single calendar, leading the way for the Courts of Appeal to also switch to remote arguments, mostly by videoconference, though a few still remain telephonic.

Meanwhile, after initial postponing arguments from its March and April 2020 sittings "indefinitely," the United States Supreme Court began teleconference arguments in May 2020, which continue to this day. While arguments are still by phone, not video, the speed and nature of this response is in stark contrast to the Supreme Court's operations during two earlier pandemics. During the outbreak of yellow fever in 1790 and the Spanish flu in 1918, the Supreme Court suspended its sessions and adjourned for the entire term. Taking the Supreme Court's lead, the federal courts of appeals, some already comfortable with electronic filings and remote sessions, especially in the Ninth and D.C. Circuits, also adapted quickly to virtual arguments, mostly by video and also without missing calendars.

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APPEALS IN THE TIME OF CORONA | *Continued from page 6*

The silver lining? In addition to being nimble and flexible, state and federal appellate courts have displayed admirable concern and compassion for the attorneys and parties who are grappling with limited resources and increased workloads. Some, like the United States Supreme Court, have agreed to ask questions in a pre-determined order to help attorneys arguing on the phone to an invisible bench. Others have allowed a few minutes of uninterrupted argument or extended the time for argument to allow for technological glitches and time lags. Most also ordered automatic extensions for briefing and other non-jurisdictional deadlines, plus provided pre-argument training sessions to help practitioners learn their particular court's technology and process.

Professor Richard Susskind presciently predicted in his 2016 bestseller, "Tomorrow's Lawyers," that virtual appearances and online courtrooms would become the norm in the future. The pandemic not only hastened this transformation, but also made appellate courts a partner, not just a bystander, in helping struggling lawyers pivot towards learning presentation skills beyond conversational advocacy. This included guidance on everything from camera angle and optimal sound to virtual backgrounds and professional dress, with the unmistakable message that we are all experiencing and untangling the new normal together.

Budget and Finances

After years of budget cuts for state and federal judiciaries, this year also brought welcome news in the form of proposed increases in funding to help those trying to access courts during the pandemic. State and federal funding proposals include critical new investments to support essential court services during the pandemic, including pilot programs for early disposition calendars; technological courthouse renovations; research on technologies for remote operations with a focus on ease of use, cost, accessibility, functionality, and interoperability. As Chief Justice Cantil-Sakauye put it at a recent Judicial Council meeting, the pandemic has sharpened focus on her court's vision of Access 3-D, making access to justice three-dimensional – physical, remote, and equal. While the impacts of the COVID-19 pandemic may disproportionately fall upon the poor, the judiciary's response may actually help to level the access-to-justice playing field.

Court and Private Settlement Rates

The Ninth Circuit's mediation program has always been very reputable, famously resolving even a death penalty appeal (with the parties' agreement to a sentence of life imprisonment). But whereas such mediations were always telephonic, the pandemic allowed them to be conducted by video. Unofficial data suggests that this has increased the settlement success rate, not least of all because it is easier to be persuasive (and harder to be unreasonable) in a face-to-face interaction, even in the virtual world.

While the California Courts of Appeal have a less publicized court mediation program, settlements through the court and private mediations at the post-trial, pre-appeal, and appellate stages appear to be increasing as well. Anecdotal evidence suggests that this is due in part to economic pressure on parties to hasten collecting any judgment award. But an upside has been less posturing, more realistic expectations, and less time spent on stressful appellate litigation.

Marquez ended "Love in the Time of Cholera" with a twist—the reunited lovers face scandal on their return from a river voyage on which they finally consummate their love, and force the ship's captain to fly a telltale yellow flag after the other passengers disembark. This ominous sign of a cholera outbreak forever exiles the lovers to cruise the river. Thus, the good doctor's failure to eradicate cholera allows his widow to rediscover her first love, almost redeeming the deadly disease. Perhaps time, perspective, and further unexpected pivots will allow us to view the Coronavirus as more than the unwarranted catastrophe that it seems, and even find a few redemptive lessons in it as well.

Rupa G. Singh is a certified appellate specialist who handles civil appeals and critical motions in state and federal court at Niddrie Addams Fuller Singh LLP. She is founding president of the San Diego Appellate Inn of Court, former chair of the County Bar's Appellate Practice Section, and a self-proclaimed literature nerd. She is married to a telecom engineer, and the proud mother of three bookworms.

Interview with Judge Carolyn Caietti

— *By Caitlin Macker*

While Judge Carolyn Caietti is the newest addition to the San Diego Superior Court's civil bench, she joins the Civil Division with over fourteen years' experience serving as a judge in the criminal and juvenile courts. Before her appointment in 2006, Judge Caietti spent over nineteen years as a civil litigator and now brings both her judicial and personal experience as a civil litigator to Department 70.

I had the pleasure of speaking with Judge Caietti about her prior experiences, her new role, and what she envisions for her new chapter on the bench.

Q: You were first appointed to the San Diego Superior Court back in 2006. What was your experience like when you first joined the bench and how have you evolved as a judge since your appointment?

Coming from a civil background, of course my first assignment had to be misdemeanor arraignments! My criminal law experience, if you want to call it that, was in law school. Now I was a new judge, working with attorneys whom I had never met, all of whom knew more about the criminal law than I did. I spent long hours getting up to speed on criminal law. Then I was off to juvenile court for ten years and once again had to learn something completely new. Fortunately, civil is not completely foreign to me.

As a new judge, you are transitioning from being an advocate to being a neutral. I spent my early years on the bench learning how to be a judge and what that means. It is an adjustment and it takes time to become comfortable in this new role. I thought it would be easy. It wasn't and it still isn't. You are making decisions that impact people's lives and you want to do your best to get it right. To this day, I consistently reflect on what I do and am grateful for the opportunity to serve the public in my position. I've also learned the importance of patience and have a better appreciation of the roles each of us plays in the justice system. A judge can have an enormous impact on the community which is why I participate in various legal organizations as well as present to the public on the importance of civics and an independent judiciary. As I have become a more seasoned member of the bench, I enjoy providing mentorship to newer judges– having been there myself and having been fortunate to have some wonderful mentors.

Q: You mentioned that you had relied on mentorship from other judges when you were first appointed. Is there any advice you received as a new judge that has stuck with you over the years?

Treat everyone with respect and dignity no matter who they are. Read the briefs, listen to the attorneys or parties, do your research and MAKE A DECISION! Do your best to make the legally correct decision but recognize you may not get it right 100% of the time.

Q: What would you say are the biggest differences between your new role as a civil court judge and your prior roles as a judge in the criminal and juvenile courts?

A juvenile court judge is a collaborator and facilitator. The court, attorneys, probation, social workers, and others work together towards the best outcomes for a child and family. I would also facilitate introductions and convene meetingswith stakeholders and policymakers at the local and state levels to ensure the appropriate resources were available to assist those in the juvenile justice and dependency systems. My role as a criminal court judge was to work with the lawyers to make sure the most appropriate outcome is achieved for the accused, upholding the constitutional rights of a defendant as well as the rights of a victim. My past experience in juvenile court was a good primer for the current trends in the criminal justice system.

As a civil court judge, I see my role as working with the parties towards a resolution of their case. I enjoy working with the lawyers in trying to find common ground, compromise on issues rather than having everything decided by law and motion or on the courthouse steps with a jury about to walk into the courtroom. I have found the juvenile and criminal bars work really well together – perhaps because they will likely see each other on future cases.

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JUDGE CAROLYN CAIETTI | *Continued from page 8*

That is not necessarily the case with the much larger civil bar. Fewer civil practitioners know each other and are less likely to interact with each other in the future. Sometimes this gets in the way of working through issues on a case. I am available to assist with facilitating settlement discussions and informally resolving discovery disputes. A lot of times disputes can be resolved by just talking to one another or having a neutral party such as the court provide suggestions or recommendations.

Q: Prior to being appointed to the bench, you were a civil litigator. Is there anything you miss about practicing law?

I miss the trial work-the art of examining witnesses, oral argument, and advocacy. As a judge, I am a neutral. That is not to say that there are not times during a trial where I wonder "why aren't you asking the question this way"? Or, "Why aren't you arguing this point"? I recognize the lawyers know their case better than I do and likely have a reason why they are handling something in a particular manner. I also miss Friday court hearings where the civil litigators would appear in person and see all of your buddies.

Q: The Covid-19 pandemic has resulted in quite a few changes to the practice of law. Do you think any of the changes are positive or will extend beyond the pandemic?

More litigants are participating in the process than ever before now that we offer remote hearings. From an access to justice perspective, this is quite positive. It is also less time-consuming and more cost-effective in many respects. No travel time, no paying for parking, and no waiting all morning or all day in a courtroom for your matter to be heard. COVID-19 has also forced the Court to become more tech-savvy and automated.

Attorneys are getting used to conducting meetings, depositions, and court hearings remotely-hopefully that will continue in the appropriate cases. Not every matter requires an in-person court appearance. Once the Covid-19 pandemic goes away, I suspect we will continue to offer remote proceedings for several hearings such as case management, status conferences, ex partes, some motions, and even certain bench trials.

Q: What do you enjoy doing outside the courtroom?

Travel, garden, golf, e-bikes. I also enjoy supporting civics learning opportunities at a state and local level to youth grades K-12 through the statewide Power of Democracy Task Force and the local Civic Learning Partnership which I co-chair with Justice Judith McConnell.

Q: What are three things you wish you could tell attorneys before they appear before you?

Be professional, be on time and be prepared. Remember the public's impression of the legal profession depends in part, on all of us, in maintaining the utmost respect and integrity of the law, the participants in legal proceedings, and of each other.

To hear more from Judge Caietti, she will be participating in ABTL's March 25th, 2021 Brown Bag Lunch at noon - REGISTER HERE

Caitlin Macker is an associate at Caldarelli Hejmanowski Page & Leer LLP, and is on ABTL's Leadership Development Committee.


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Superior Court Update

— By Judge Lorna Alksne

It has been a year since our court decided, based on the initial "stay at home" order implemented by Governor Newsom, to suspend all jury trials in San Diego County. I admit it never occurred to me in March 2020 that we would not be bringing in jurors for almost a year. In the last 12 months, what became the new normal is having plexiglass barriers, everyone staying six feet apart, appearances by remote video, and wearing masks. Indeed, our focus was on keeping everyone healthy and it was hard to even imagine we could go back to the way it was in our courthouses before the pandemic. The mere thought of packed courtrooms or jury lounges teeming with jurors seemed irresponsible. Now, as we begin to summon jurors again, let me suggest, that we can and we will return to a new normal, albeit slowly and differently.

As active practioners well know, the Superior Court of San Diego is a large, busy, urban trial court. In the last several years our court has conducted between 800-1000 jury trials a year of all case types and sizes, with about 120-150 of those jury trials involving civil cases. In contrast, since March 2020 we have held less than 20 criminal jury trials, and only 2 civil jury trials.

So many of you have posed this question to me over the last year: When can I get a realistic trial date for my civil case? Well, as we found out, jury trials and pandemics don't really work well together. There is a need for spacing everywhere, including hallways, elevators, bathrooms, escalators and courtrooms. More specifically, there is a need to keep the jurors socially distanced in the courtroom and in the jury lounge.

In some ways we are better off than other counties. Both of our courthouses that hear civil cases have large modern courtrooms and good size jury lounges. In our Central Courthouse, we can accommodate 75 jurors at one seating with social distancing in mind. In the Vista Courthouse, the lounge holds 65 at one time. Also, on the positive side, we are now set up with one large courtroom (the old Construction Defect Courtroom) at the Hall of Justice with full plexiglass around the juror chairs, witness, bench, and counsel tables. This courtroom will be used for juror selection through trial. It can safely accommodate 33 jurors for voir dire. In Vista, we also have one courtroom (Dept. 25) set up with similar plexiglass, and that courtroom can accommodate 18 jurors for voir dire and trial.

However, while we have designated space to try civil cases, we also need to share the summoned jurors to provide jurors for criminal jury trials. This means the number of both criminal and civil jury trials that can be selected each month will be limited throughout the county for the foreseeable future.

While we will have hurdles to overcome in completing a large number of civil jury trials for the rest of 2021, the good news is that we are setting trials and summoning jurors for civil cases!

As we start the slow return to the new normal, there are many steps we can take to eliminate inefficiencies and methodically reduce the backlog of civil cases. First, given that we are open for civil trials and have started prioritizing them, now is the time to start negotiating with your opponent. Don't wait to the courthouse steps. Second, consider stipulations or agreements that will expedite your trial, such as stipulating to certain facts or the admissibility of documents, or agreeing to remote testimony from certain witnesses. By taking these lesser disputes off the table, you can focus on the core issues that the jury has to decide. Third, think about stipulating to a smaller jury panel. With fewer jurors on each case, we could socially distance them in other courtrooms and we could have more trials occurring at the same time. Fourth, we are open for civil in-person bench trials. Maybe there is one issue that is preventing settlement that could be tried to the court to help resolve the case? Lastly, would a judicial settlement conference be of assistance? We have many judges that are willing to handle civil settlement conferences remotely which would be at no cost to your clients.

In sum, I'd answer every civil trial lawyer's question with a question of my own: How soon can you work with opposing counsel to streamline your case? As soon as you have made those efforts, I encourage you to ask your trial judge for a date to try your case.

The Legacy of Justice Ginsberg Lives On

— By Vivian Adame

JUSTICE GINSBURG

An inspiration to many and a mentor to a lucky few, Justice Ruth Bader Ginsberg captivated many hearts through her meticulously reasoned arguments. However, those who knew Justice Ginsberg personally also saw how she had both a way with words and a way with people.. At the ABTL's Quarterly Dinner Program on February 16, 2021, three distinguished jurists shared their personal experiences with the "notoriously" passionate, hardworking, and brilliant Justice Ginsberg. The panel discussion, entitled "The Legacy of Justice Ginsberg," featured California Supreme Court Justice Goodwin H. Liu and United States Circuit Judges M. Margaret McKeown and John B. Owens of the Ninth Circuit Court of Appeals. Although Justice Ginsberg took pride in her ability to bring the law to the people, Judge McKeown, Judge Owens, and Justice Goodwin reminded those in attendance that Justice Ginsberg's legacy spans far beyond her status as a pop culture icon.

Justice Ginsberg "did more than any other person to bring about a revolution with gender jurisprudence," noted Justice Liu. However, as busy as Justice Ginsberg was throughout her career having "change[d] the landscape of discrimination . . . one case at a time," Judge McKeown marveled at Justice Ginsberg's willingness to take an interest in those who contacted her. Judge McKeown shared that Justice Ginsberg would "write back to those who wrote to her," which is how Judge McKeown's friendship with Justice Ginsberg started. When taking a class on sex discrimination in law school, then-law student McKeown wrote then-Columbia Professor Ginsberg a letter because there was so little material on sex discrimination at the time. Judge McKeown recalled Justice Ginsberg was "incredibly generous with her time and materials, and it was so important [for Judge McKeown] as a law student to realize that someone of [Justice Ginsberg's] stature would take the time to respond." Thereafter, Justice Ginsberg followed Judge McKeown's career to some degree, and they developed a lifelong friendship.

Justice Liu and Judge Owens both served as Justice Ginsberg's law clerks prior to her becoming known as the "notorious RBG." A question Judge Jill L. Burkhardt posed to Justice Liu and Judge Owens was at the forefront of many in attendance at the event: is it possible to overcome the feeling of "quaking in your shoes" when working for one of the most revered Supreme Court Justices? Judge Owens candidly admitted that although the feeling of awe lessened, it never entirely went away. Echoing this sentiment, Justice Liu shared that his relationship with Justice Ginsberg was personal, but she was not an individual with whom the law clerks would let their hair down around, even though they may have wanted to give her a bear hug. Judge Owens noted that he, like many others, feared letting Justice Ginsberg down. Even Judge McKeown, who was on a first-name basis with Justice Ginsberg, agreed that she did not want to disappoint Justice Ginsberg.

When thinking about his relationship with Justice Ginsberg and its impact on his position on the bench, Justice Liu acknowledged, "there's a lot of RBG, and it's in the front of my mind, not the back." The way Justice Ginsberg approached writing and her colleagues proved instructive to Justice Liu, which he acknowledged could be difficult for many judges to keep in mind when juggling the various demands of serving on the bench. Justice Ginsberg paid particular attention to remaining collegial, even when difficult situations arose; she had "an institutional mindset, revered the Court, and did not want anything to damage the Court's credibility," Justice Liu noted. Justice Ginsberg understood she would have to work with colleagues long-term and recognized there were always bigger considerations in the background. Because of her intuition, Judge Owens noted that Justice Ginsberg refrained from taking "cheap shots" towards her colleagues and in her opinions, even if her colleagues engaged in that behavior. Justice Liu applauded Justice Ginsberg for being "a trailblazer in her own right; she just had a marvelous way of not only giving us a result and giving us doctrine, but doing it in a way that was gracious to colleagues and rounding out an arch of history to give us broader meaning."

In his experience as a member of the judiciary, Judge Owens noted, "there is an interesting tension between not being afraid to speak out, but knowing how to say [what you would like to say], respectfully." It was Justice Ginsberg's position that, if she—or any member of the judiciary—had something to

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JUSTICE GINSBERG | *Continued from page 12*

say, they had an obligation to speak out if something could be improved. To this end, Justice Ginsberg had "an incredible, almost politician's savvy," Justice Liu noted, because "she knew how to modulate her writing in just the right way." Justice Liu went on to describe Justice Ginsberg's writing as "never toxic, but just powerful enough to sting when it needed to," which was important not just for a legally trained audience but also for the lay public. Nodding in agreement, Judge McKeown said, "Justice Ginsberg did not have a mean pen; she could be forceful, but she was not mean, which made her writing all the more powerful."

When crafting her thought-provoking arguments and well-reasoned opinions, Justice Ginsberg believed in the "economy of words," which was one of the most important lessons Judge McKeown learned from her. "The first two paragraphs [of any opinion Justice Ginsberg wrote] were tight, tight, tight like any brief should be," said Judge McKeown. Justice Ginsberg "was a meticulous writer and she took great pains to get the first two paragraphs of every opinion perfect, because she knew busy people and reporters would not have time to read an entire 90-page opinion," said Justice Liu. When reflecting on her writing, Justice Liu felt Justice Ginsberg had a way with words, particularly when it came to knowing when to leave something unsaid. Moreover, unlike anyone Judge Owens had ever met, Justice Ginsberg worked so hard to get to the right answer. "Clerking for her was not intimidating, it was inspiring," Judge Owens reflected.

In one of her last interviews with Justice McKeown, Justice Ginsberg urged the public to "watch what we do," because the actions of the United States Supreme Court are just as crucial as its words. Now that Justice Ginsberg is gone, the world is watching—and hoping—for her legacy to continue to grow through positive change.

Vivian Adame is an associate at Wilson Turner Kosmo LLP, and is a member of ABTL's Leadership Development Committee.

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California Case Summaries: Monthly™

FEBRUARY 2021

— By Monty A. McIntyre,
Mediator, Arbitrator & Referee at ADR Services, Inc.

CALIFORNIA COURTS OF APPEAL

Arbitration

Roussos v. Roussos (2021) _ Cal.App.5th _ , 2021 WL 567366: The Court of Appeal reversed the trial court's order granting plaintiff's petition to confirm an arbitration award. In August of 2017, plaintiffs demanded arbitration pursuant to an arbitration agreement entered in 2012. In the 2012 agreement, the parties agreed not to contest that Judge John P. Shook would arbitrate all issues with binding authority over them. In early 2018, the trial court granted plaintiff's motion to compel arbitration. Judge Shook shortly thereafter served on the parties a disclosure report disclosing two matters, both in 2016, in which he had served as an arbitrator. Defendant then timely filed a notice of disqualification of Judge Shook as the arbitrator based on the disclosure report pursuant to Code of Civil Procedure section 1281.91(b). The arbitrator denied defendant's disqualification request, and ultimately entered an award in favor of plaintiffs. The Court of Appeal ruled that, despite the 2012 agreement, the arbitrator was a proposed neutral arbitrator for the arbitration under Code of Civil Procedure sections 1281.9 and 1281.91, and under section 1281.91(b)(1). As such, the arbitrator was required to disqualify himself upon defendant's timely notice of disqualification. The Court of Appeal ruled that the parties could not contract away California's statutory protections for parties to an arbitration, including mandatory disqualification of a proposed arbitrator upon a timely demand. (C.A. 2nd, February 16, 2021.)

Attorney Fees

Guo v. Moorpark Recovery Service, LLC (2021) _ Cal.App.5th _ , 2021 WL 423563: The Court of Appeal reversed the trial court's order denying a judgment creditor's motion for attorney fees under Code of Civil Procedure section 685.040. The Court of Appeal ruled that, because the judgment indicated that defendants were the prevailing parties under Code of Civil Procedure Section 1032 and were entitled to recover their costs of suit and reasonable attorney fees in the action, even though no dollar amount was stated in the judgment, they were awarded attorney fees under section 685.040, and judgment creditor was entitled to attorney fees incurred in enforcing the judgment. (C.A. 1st, February 8, 2021.)

Civil Code

Ruiz Nunez v. FCA US LLC (2021) _ Cal.App.5th _ , 2021 WL 752644: In a lemon law case alleging violations of the Song-Beverly Consumer Warranty Act (Song-Beverly Act; Civil Code, section 1790 et seq.), the Court of Appeal reversed in part and affirmed in part a judgment for plaintiff, following a jury trial, awarding plaintiff damages of $45,378.99, $179,510 in attorney fees, and $31,888.49 in costs. The judgment was reversed because the trial court erred in giving a special jury instruction, requested by plaintiff and objected to by defendant, stating that if a defect existed within the warranty period the warranty would not expire until the defect had been fixed. This instruction misstated the law and conflicted with another instruction given to the jury, CACI No. 3231, which correctly explains the continuation of warranties during repairs. The Court of Appeal affirmed the trial court's order granting defendant's motion for nonsuit on plaintiff's cause of action for breach of implied warranty. Defendant was the manufacturer of the car, not a distributor or dealer who sold the used car to plaintiff, and therefore was not liable under the lemon law for breach of implied warranties in the sale of a used car. (C.A. 2nd, February 26, 2021.)

Civil Procedure

Crestwood Behavioral Health, Inc. v. Super. Ct. (2021) _ Cal. App.5th _ , 2021 WL 613700: The Court of Appeal denied a writ petition seeking to overturn the trial court's order denying defendant's motion to transfer venue from Alameda to Sacramento, where petitioner's principal place of business was located, in an action filed under the Private Attorneys General Act (PAGA; Labor Code, section 2698 et seq.). Ruling on an issue of first impression, the Court of Appeal denied the petition, concluding that venue was proper in any county in which an aggrieved employee worked and Labor Code violations allegedly occurred. (C.A. 1st, February 17, 2021.)

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Insurance

Guastello v. AIG Specialty Insurance Company (2021) _ Cal.App.5th _ , 2021 WL 650878: In an action where plaintiff sued an insurance company under Insurance Code section 11580(b)(2) after it had obtained a default judgment against a subcontractor who had built a retaining wall that failed, the Court of Appeal reversed the trial court's order granting defendant's motion for summary judgment on the basis that the failure of a retaining wall built by the subcontractor occurred long after the insurance policy had expired, and therefore the insurance company had no duty to cover the default judgment. The insurance policy provided coverage based on the timing of an "occurrence." Plaintiff alleged that "continuous and progressive" damage began to occur shortly after the subcontractor built the retaining wall during the policy coverage period. The insurance company disagreed. The Court of Appeal ruled that the determination of when the occurrence took place was a question of fact requiring the denial of the motion for summary judgment. (C.A. 4th, February 19, 2021.)

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Monty A. McIntyre is the publisher of California Case Summaries™ (https://cacasesummaries.com/) where he offers monthly, quarterly and annual civil case summaries. California Case Summaries: Monthly™ has short summaries, organized by legal topic, of every new civil and family law decision published each month for $50 per month per person. California Case Summaries: Quarterly™ has succinct summaries of every new civil and family law decision published each quarter, with the official case citations, for $200 per person per quarter. California Case Summaries: Annual™ has short summaries of every new civil and family law decision published each year, with the official case citations, for $900 per person per year. Monty A. McIntyre, Esq. is also Mediator, Arbitrator & Referee at ADR Services, Inc. For ADR Services, Inc. scheduling, contact his case manager Haward Cho Phone: (619) 233-1323. Email: haward@adrservices.com

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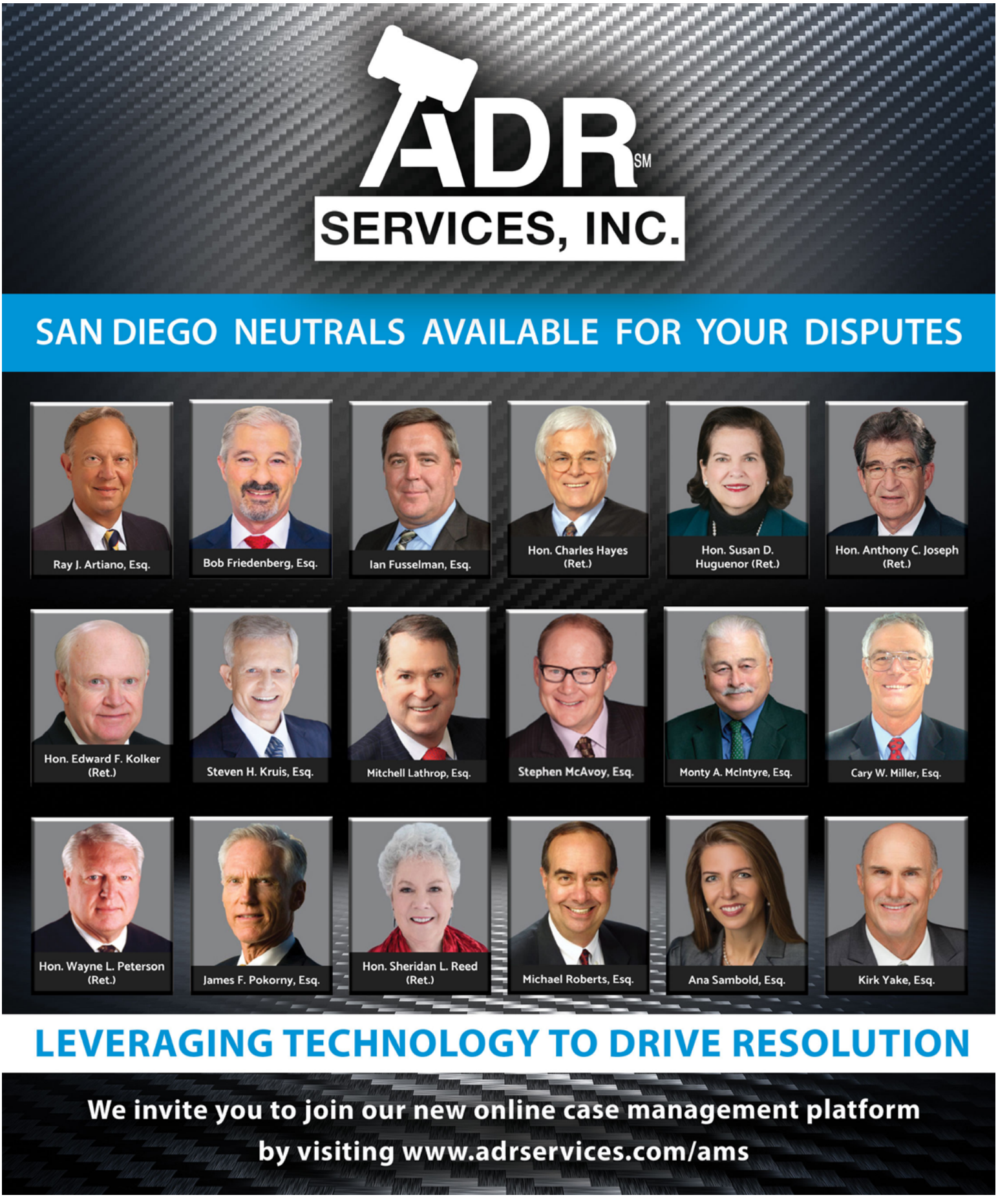
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For Now, the *Dynamex* Decision Is Retroactive – Workers and Employers Be Aware

— By Chase Stern

Article reprinted with approval | The Monitor 2021, a quarterly publication by Johnson Fistel, LLP.

In mid-January 2021, the California Supreme Court issued its ruling on whether the "ABC test" articulated in its 2018 *Dynamex Operations West Inc. v. Superior Court of Los Angeles* decision applies retroactively. At stake was the status of thousands of workers classified as independent contractors prior to *Dynamex*. One of many questions *Dynamex* left unanswered: would these workers' classifications be assessed according to the rules then in effect, or pursuant to the later-adopted "ABC test" set forth in *Dynamex?* The California Supreme Court answered this question by retroactively extending Dynamex and its "ABC test" to workers previously classified as independent contractors.

Recall that the California Supreme Court's decision in *Dynamex* dramatically altered the employment landscape in California by imposing the presumption of employment and placing the burden on the hiring entity to establish an independent contractor relationship. To demonstrate an independent contractor relationship, all three prongs of *Dynamex's* ABC test must be satisfied:

(A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

(B) the worker performs work that is outside the usual course of the hiring entity's business; and

(C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Before the ABC Test, California courts and California hiring entities used a multifactor test outlined in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations,* commonly known as the "*Borello* Test." The *Borello* Test focused on the amount of control a business exercised over a worker by looking at numerous factors, and historically favored independent contractors. The more control a business exercised over a worker, the less likely that the worker could be properly classified as an independent contractor.

Following *Dynamex,* courts issued divided opinions on whether the ruling was retroactive. In 2019, the U.S. Court of Appeals for the Ninth Circuit in *Vazquez v. Jan-Pro Franchising Int'l, Inc.* initially held that *Dynamex* applies retroactively, but later withdrew its opinion and certified the question of retroactivity to the California Supreme Court. The Supreme Court in *Vazquez* explained that judicial interpretations of legislative measures are generally given retroactive effect, even when the statutory language in question had been previously interpreted differently by a lower appellate court. Accordingly, absent a justified exception, the *Dynamex* decision – premised on a novel interpretation of the California Industrial Wage Commission wage orders – applies retroactively. The court rejected the contention that hiring entities' previous reliance on the *Borello* decision justified an exception to retroactive application – drawing a distinction between the California Labor Code language considered in *Borello* and the wage order language analyzed in *Dynamex*. The court further explained that fairness and the policy considerations of worker protection espoused by the wage orders weighed heavily in favor of retroactive application.

Vazquez settles that the employee/independent contractor relationship with respect to the wage orders will be analyzed under the ABC test, even if the conduct in question occurred prior to the *Dynamex* decision. This decision immediately impacts all pending classification litigation, and could lead to additional litigation regarding allegations of past misclassification previously thought to comply with *Borello* and other appellate authorities.

Any employers defending against independent contractor misclassification cases that predate the 2018 *Dynamex* decision should reevaluate those issues under the more demanding ABC Test rather than rely on the more favorable, but outdated, *Borello* Test. And for those employers not facing misclassification litigation at the moment, the *Vazquez* decision justifies company worker classification audits looking back beyond 2018. As for any California independent contractor, this is an issue that warrants immediate consideration of employment status.

Bottom Line:

California's ABC Test for determining whether a worker is an employee or an independent contractor applies to claims implicating a time period prior to issuance of the *Dynamex* decision in April 2018.

Chase Stern is an associate at Johnson Fistel, LLP's San Diego office and a member of ABTL.

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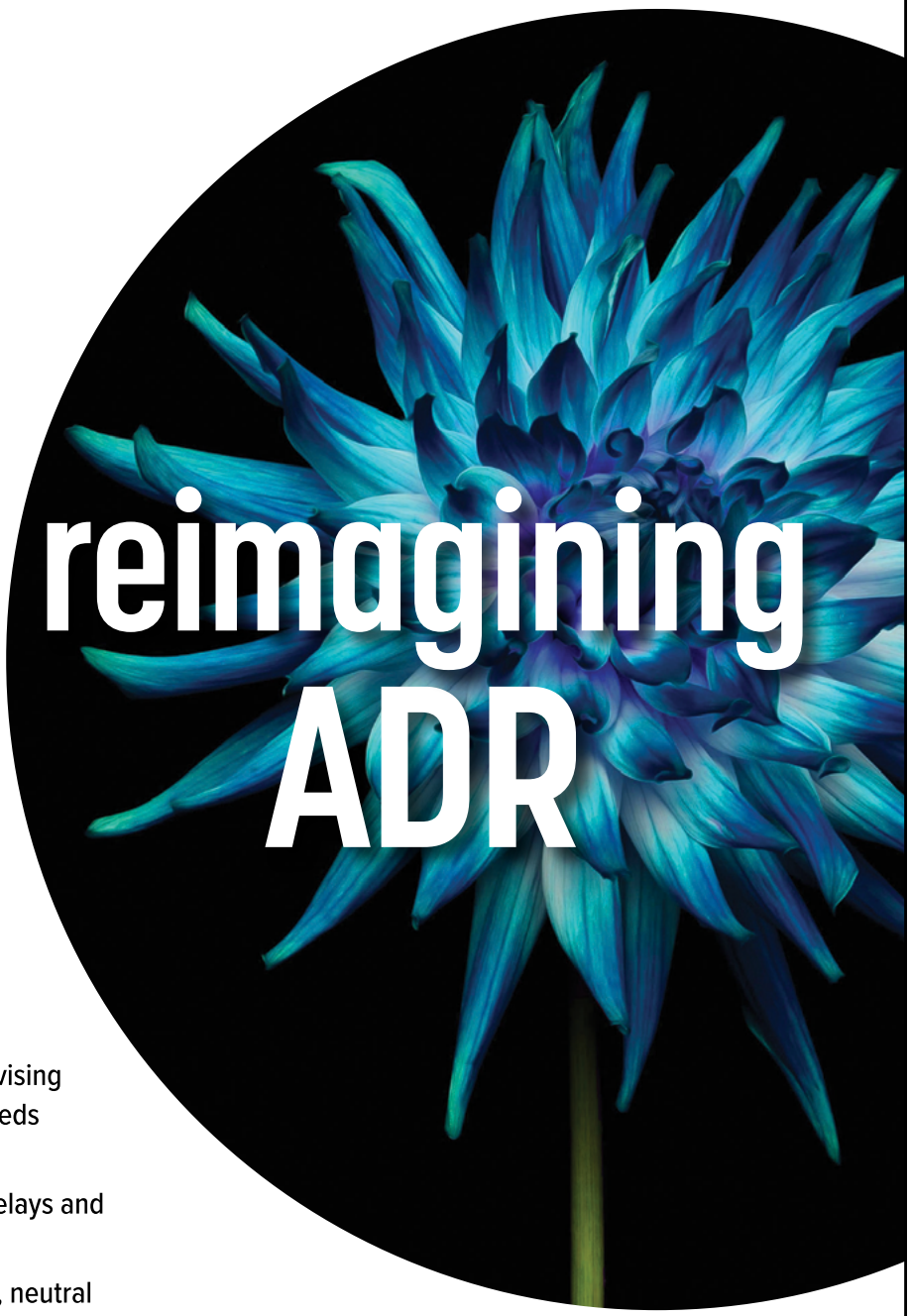

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Shareholder Litigation in the Pandemic: Business as Usual?

— By Frank Johnson and Mary Ellen Connor

Article reprinted with approval | The Monitor 2021, a quarterly publication by Johnson Fistel, LLP.

In March 2020, the COVID-19 pandemic left investors and companies alike wondering whether they should expect a wave of COVID-related shareholder litigation. To many, including several prominent international defense firms, the pandemic appeared to have shaped a market ripe for such lawsuits—healthy stock prices in early February took a plunging nosedive by the end of March. After all, it was this same broad-based stock pricing pattern that prompted an explosion in shareholder litigation during the dot-com crash of 2001 and the financial crisis of 2008.

But this expectation has not become the reality. According to an article published in early February in Law360, "[s]ecurities class action filings dropped by 22% in 2020 from a record high the year before" and so-called "core filings"—securities filings not related to M&A transactions—were down 12% in 2020 compared to the prior year, although filings remain in line with other recent years. For support, that article cited to the annual report entitled "Securities Class Action Filings: 2020 Year in Review" published by Cornerstone Research and the Stanford Law School Securities Class Action Clearinghouse. Big defense law firms echoed similar data on their websites and in articles, reacting to their prior client alerts advising of an anticipated wave of shareholder litigation earlier in 2020.

For shareholder litigation firms, however, this is not surprising. For starters, unlike the 2001 dot-com crash resulting from speculation in internet-based companies in the late 1990s and early 2000s, and the 2008 financial crisis predicated on widespread, systemic fraud in the financial and mortgage industries, the COVID-19 pandemic resulted from a public health crisis. In other words, nothing inherent about the pandemic necessarily suggests fraud or that boards of directors have otherwise breached their fiduciary duties.

But that is not to say shareholder litigation related to COVID-19 has been non-existent the past year. Shareholder litigation firms have not been deterred by the pandemic and continue to hold corporate fiduciaries accountable for breaching their fiduciary duties, with COVID-19-related shareholder litigation typically falling into one of two categories: (i) cases alleging misstatements regarding the detrimental impact of COVID-19 on the company's business, which have largely concerned companies in industries hardest hit by the pandemic, like the travel industry, and (ii) lawsuits alleging overly optimistic statements regarding COVID-19-related drug therapies or products by pharmaceutical companies and biotechnology companies.

For example, in March 2020, shareholders of Norwegian Cruise Line filed a suit in the U.S. District Court for the Southern District of Florida alleging the company issued misleading statements about the risks posed by COVID-19 to the cruise line industry and financial health. Likewise, shareholders of Carnival Corp. filed a similar suit also in the U.S. District Court for the Southern District of Florida shortly thereafter, alleging that the cruise line concealed its knowledge of the risks from COVID-19 to its business and industry.

And in April 2020, shareholders filed a derivative action against Inovio Pharmaceuticals in the Eastern District of Pennsylvania, alleging false and misleading statements about a potential vaccine for COVID-19. Similarly, SCWorx Corp. also found itself the subject of litigation in the Southern District of New York, where shareholders claimed the company misled investors by touting a "bogus" COVID-19 rapid test.

So although the COVID-19-related market crash has not, like its predecessor market crashes and as many expected it would, generated a significant uptick in shareholder litigation, wayward fiduciaries are at the same time not absolved from liability amidst the pandemic and shareholder litigation firms continue to pursue meritorious claims against corporate fiduciaries.

The takeaway for corporate investors? Shareholder litigation might just be one of the rare areas in which it remains "business as usual" in the pandemic.

Frank Johnson is managing partner at Johnson Fistel, LLP. He holds a seat on the ABTL Board of Governors, is Co-Chair of the Bi-Annual Seminar and Co-Chair of the Annual Mock Trial.

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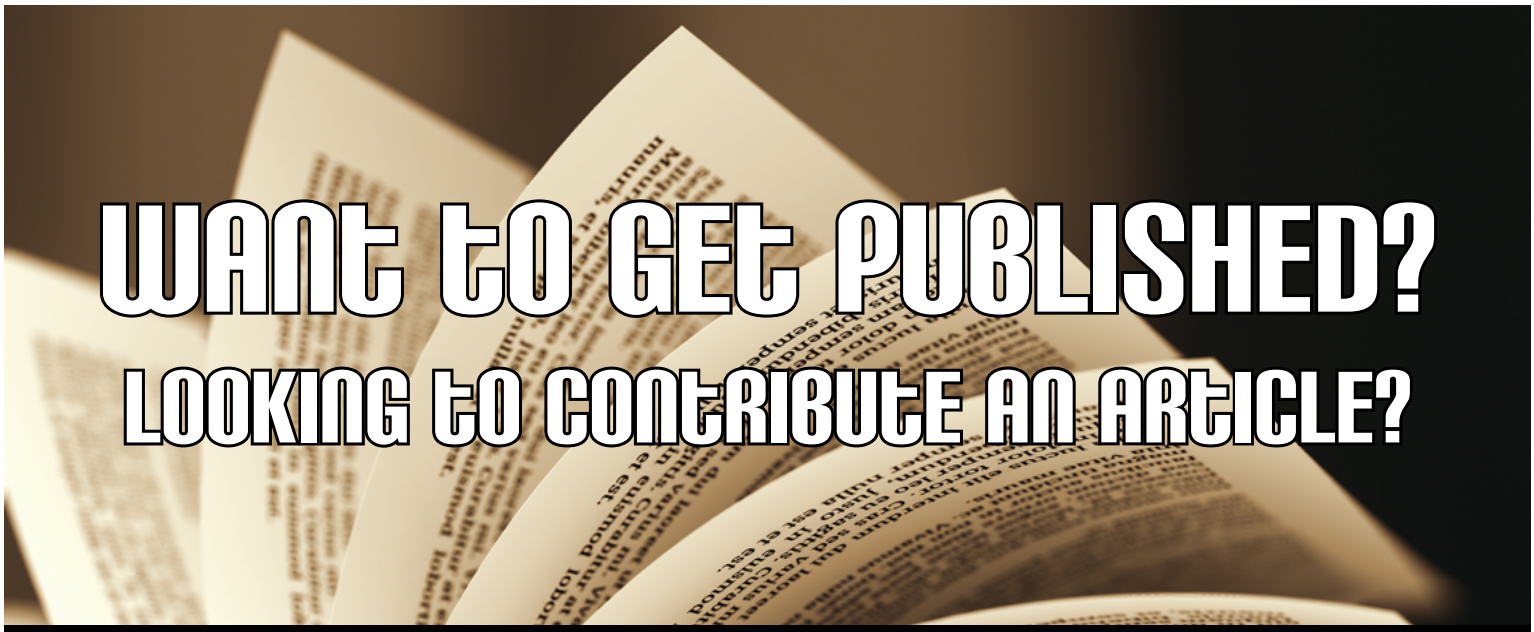

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